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Washington

OFFICE OF
THE SECRETARY

May 31, 2000

Steven Bradbury, Esquire
Kirkland and Ellis
655 Fifteenth Street, N.W.
Washington, D.C. 20005

Re: Motion to Accept Comments As Timely Filed in CC Docket No. 98-184

I have received your request that the Commission accept your comments as timely in the above-referenced proceeding. In support of your request, you assert that you experienced technical difficulties with our Electronic Filing System (ECFS).

Pursuant to 47 C.F.R. Section 0.231(I), I have reviewed your request. After consulting with the administrators and technical staff for the ECFS, I have determined that the ECFS was functioning properly at the time of your filing. Therefore, a grant of your request to accept your comments as timely is not warranted.

I have stamped your comments as received on May 10, 2000. Nonetheless, I have forwarded your request to the Common Carrier Bureau so its staff can determine whether to consider the substantive issues that you raise in your comments.

Cordially,

Magalie Roman Salas

Magalie Roman Salas
FCC Secretary

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PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

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May 10, 2000

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MAY 1 0 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: ***GTE Corp. and Bell Atlantic Corp., CC Docket No. 98-184***

Dear Ms. Roman Salas:

I am enclosing for filing in the above docket the original and the required number of copies of the Response of Bell Atlantic and GTE in Support of Their Further Submissions.

Please note that the filing deadline for these comments was yesterday, May 9. We began to file the comments electronically through the Commission's Web site last night at approximately 11:30 pm. Unfortunately, after transmitting our cover sheet, we received repeated "application error" messages from the Web site when attempting to attach and transmit our comments, and we were not allowed to complete the filing. We also experienced extremely slow response time from the server. In order to get our comments on record at the Commission before midnight, we e-mailed them to the Commission through the Web site at approximately 11:55 pm. We then accessed an alternative link on the Commission's site, and we eventually completed the electronic filing by approximately 12:10 am this morning. I am attaching the Commission's acknowledgment of receipt of our electronic filing.

In light of the above, I respectfully request that the enclosed comments be deemed to have been timely filed on May 9, 2000. Please also note that courtesy copies of the enclosed comments

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were faxed to counsel for AT&T and the Competition Policy Institute shortly after midnight last night. Please call me if you have any questions regarding this filing.

Very truly yours,

Steven G. Bradbury

Steven G. Bradbury

Enclosures

Federal Communications Commission

The FCC Acknowledges Receipt of Comments From ...

Bell Atlantic/ GTE Corporation

...and Thank You for Your Comments

Your Confirmation Number is: '2000510877908 ' 1

Date Received: May 10 2000

Docket: 98-184

Number of Files Transmitted: 7

File Name	File Type	File Size (bytes)
COMMENT	WordPerfect	172031
COMMENT	WordPerfect	25779
COMMENT	Microsoft Word	92673
COMMENT	WordPerfect	2235635
COMMENT	WordPerfect	259220
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MAY 1 0 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
GTE CORPORATION,	)	
	)	
Transferor,	)	
	)	
and	)	CC Docket No. 98-184
	)	
BELL ATLANTIC CORPORATION,	)	
	)	
Transferee,	)	
	)	
For Consent to Transfer Control.	)	
	)	

RESPONSE OF BELL ATLANTIC AND GTE IN SUPPORT OF THEIR FURTHER SUBMISSIONS

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I. INTRODUCTION AND SUMMARY

The further submissions by Bell Atlantic and GTE that are the subject of the public notice provide further confirmation that their merger is strongly in the public interest and should be approved. They do so, first, by enlarging the already extensive package of conditions filed previously by Bell Atlantic and GTE in order to produce still greater public interest benefits. And they do so, second, by modifying the proposal to transfer ownership and control of GTE Internetworking (now known as Genuity) to third party shareholders in order to provide added assurance that the proposal complies fully with section 271 and increases still further the merged company's already substantial incentive to obtain 271 relief as quickly as possible.

The few opponents who claim otherwise largely rehash arguments that have been refuted in prior comment rounds, or repeat claims that were rejected by the Commission in other proceedings. To the extent opponents raise new arguments at all, their claims only highlight the fact that their objections are not based on principles of law or sound public policy, but are simply brazen efforts to further their own private pecuniary interests by imposing added costs or burdens on a competitor. Their claims should be rejected, and the merger of Bell Atlantic and GTE should promptly be approved.

II. THE EXPANDED CONDITIONS WILL FURTHER PROMOTE THE PUBLIC INTEREST

As the applicants previously demonstrated, the merger of Bell Atlantic and GTE will promote competition nationwide in a host of product and service markets including Internet, long distance, wireless, and local bundled services. And, while not necessary to find that the merger is in the public interest, the extensive package of proposed conditions filed by the applicants on January 27 would produce additional benefits. In fact, that proposal was patterned closely after the SBC/Ameritech conditions that the Commission itself concluded would promote competition for and the widespread deployment of advanced services, spur local competition generally, and help to ensure that consumers continue to receive high quality and low cost telecommunications services.

The additional conditions proposed by the applicants in their further submission would increase the public interest benefits still further, while also appropriately taking into account certain fundamental differences between the SBC/Ameritech merger and the present one. To the extent opponents argue otherwise, or claim that the proposed conditions should be expanded even further, their claims are unavailing. Each of the added conditions is addressed briefly below and in greater detail in Appendix A.

A. Carrier-to-carrier promotional discounts. In their further submission, Bell Atlantic and GTE propose to provide promotional discounts on residential unbundled loops and resale services, and to do so on terms that parallel those adopted by the Commission in the SBC/Ameritech proceeding. In that case, the Commission concluded that such discounts would produce affirmative public interest benefits. According to the Commission, the "carrier-to-carrier promotions for residential service will spur other entities to enter these markets and establish a presence in residential markets that can be sustained after expiration of the promotional discounts." *See SBC/Ameritech Order* ¶ 422.[1] If that was true in the case of SBC/Ameritech, and the Commission concluded it was, it also is true here.

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[1] In the case of SBC/Ameritech, the Commission also concluded that the discounts helped to "offset the loss of probable competition between SBC and Ameritech for residential services." *See SBC/Ameritech Order* ¶ 390. Here, in contrast, there is no such loss of probable, or even plausible, residential competition to offset. *See, e.g.,* Supplemental Filing of Bell Atlantic and GTE at 12-13 (Jan. 27, 2000) ("Bell Atlantic/GTE Supp. Filing"); Reply of Bell Atlantic and GTE in Support of their Supplemental Filing at 6-8 (Mar. 16, 2000) ("Bell Atlantic/GTE Supp. Reply").

The principal response from competing carriers is to attack the Commission's conclusion, arguing that the promotional discounts either are "insignificant" (MCI WorldCom at 7), or are "unlawful" because they are somehow discriminatory (AT&T at 3, 4-7).[2] The short answer is that, if competing carriers don't want the proposed discounts, the applicants would be glad to withdraw them. They are not necessary here in any event. If they do want them, however, the Commission itself has previously concluded that the promotional discounts do provide a significant benefit, *see SBC/Ameritech Order* ¶ 422, and expressly found that the discounts are non-discriminatory because they are being made available to all similarly situated carriers on the same terms, *id.* ¶¶ 495, 497.[3] Nothing more is required.

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[2] Despite its contrary claims here, AT&T has long provided promotional discounts with limited availability, and has successfully (and correctly) maintained that those promotional discounts are non-discriminatory under the Act. *See, e.g., AT&T EasyReach 700 Service and AT&T 500 Personal Number Service*, 2000 FCC LEXIS 1861 (2000) (approving AT&T proposal to make 800 service available only to a small group of former customers of other AT&T services). In addition, the Commission has long recognized the lawfulness of promotional discounts or other arrangements with narrowly defined availability. *See, e.g., Personal Communications Industry Association's Broadband Personal Communications Services*, 13 FCC Rcd 16857, ¶ 29 (1998) ("By now, there is a substantial body of precedent that promotional programs, volume discounts and other arrangements may be reasonable and non-discriminatory"); *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 9564, ¶ 27 (1996) (temporary promotions are lawful "provided they are available to all similarly situated customers");*Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, ¶ 129 (1991) (even individually negotiated contracts are not discriminatory if the same terms "are made generally available to other similarly situated customers willing and able to meet the contract's terms").

[3] A few parties also claim that promotional loop discounts also should be provided to advanced service (as well as voice) providers. *See* MCI WorldCom at 8; Covad at 8. This makes no sense. The reason for the discounts is to spur entry into a market segment (residential voice) that competitors typically have not entered on a widespread basis – not just to provide a financial windfall to a few companies. *See SBC/Ameritech Order* ¶ 440. In contrast, numerous competitors already provide advanced services, and it is cable companies rather than LECs that are the dominant incumbents. Moreover, so long as the promotional discounts are available to all similarly situated voice providers, there is no colorable claim that it is somehow discriminatory to not also provide discounts to differently situated advanced service providers. *See supra* n. 2 (and cases cited therein). This is especially true given that section 201 (b) – which the Supreme court concluded gives the Commission authority to implement the 1996 Act– expressly authorizes the Commission to establish different classes of communication that are subject to different charges. *See* 47 U.S.C. § 201(b); *see also Iowa Utils. Bd.*, 525 U.S. 366 (1999).

B. Expanded most favored nation treatment. In their further submission, Bell Atlantic and GTE also propose to go beyond even the expanded most favored nation condition adopted in the SBC/Ameritech condition. Specifically, in addition to allowing competing carriers to adopt voluntarily negotiated agreements from other states, the proposed condition would allow them to immediately submit issues decided by arbitration in one state to arbitration in a second state – without waiting for the minimum statutory negotiation period of 135 days to expire. *See* 47 U.S.C. § 252(b)(1). This will do two things. First, it will accelerate the ability of competing carriers to resolve issues in additional states. Second, precisely because of that, it will increase the merged company's existing incentives to resolve issues through negotiations in order to avoid the risk of receiving a potentially worse arbitrated result and having it quickly spread to other states through the accelerated arbitration mechanism.

In response, a few parties mechanistically repeat their earlier claims that competing carriers should be able to automatically adopt arbitrated terms from other states. *See* MCI WorldCom at 6; Allegiance at 2-4. As the Commission has found, however, doing so would be contrary to the Act because it would "interfere with the state arbitration process under sections 251 and 252" and allow one state effectively to preempt all other states. *See SBC/Ameritech Order* ¶ 491. Moreover, as we previously explained, expanding the condition as these parties propose would only compound the supposed problem (even presuming one exists) that they say they are trying to solve – a simple fact for which they have no answer to at all. *See* Bell Atlantic/GTE Supp. Reply at 16. Consequently, requests to expand the most favored nation provision even further should be rejected.

C. Promoting deployment of advanced services. In their original proposal, Bell Atlantic and GTE committed to provide advanced services through a separate affiliate on terms that parallel those adopted by the Commission in the SBC/Ameritech proceeding. The Commission previously concluded that this condition would promote competition for and the deployment of advanced services by "provid[ing] a structural mechanism to ensure that competing providers of advanced services receive effective, nondiscriminatory access to the facilities and services of the merged firm's incumbent LECs that are necessary to provide advanced services." *SBC/Ameritech Order* at ¶ 363.

In their further submission, Bell Atlantic and GTE modified the separate affiliate condition in order to provide additional benefits and to promote still further the deployment of advanced services. The modified condition would do so by expressly preserving the merged company's ability under certain conditions to provide wholesale advanced service arrangements to all carriers – including the merged company's separate affiliate and competing carriers alike – on non-discriminatory rates, terms and conditions.[4] This new wholesale option is in addition to (rather than in lieu of) any other options that are available to competing carriers under the Commission's rules, creating yet another alternative vehicle that competitors can use to provide advanced services to consumers.

Preserving this option will strongly promote the deployment of advanced services by allowing equipment to be deployed economically to serve multiple carriers. This is especially true where, as with residential customers and less densely populated areas, some individual retail providers otherwise may not be willing to make the necessary investments to deploy the equipment

[4] Specifically, the proposed condition would preserve the option of deploying advanced services equipment at remote terminals (and related central office equipment such as ATM edge devices needed to direct the traffic to the appropriate carrier) through the incumbent LECs. The ability to do so, however, is conditioned on using any such equipment solely to provide wholesale arrangements, on deploying equipment that is consistent with national standards where they exist, and on making those wholesale arrangements available to all carriers on the same terms.

themselves. And, at the same time, adding this option fully preserves the benefits perceived by the Commission in the creation of a separate data affiliate.[5]

Indeed, even a habitual opponent such as MCI WorldCom "strongly supports" making such wholesale arrangements available (at 3), and only a single party objects to the concept of permitting such wholesale arrangements, *see* Northpoint at 2. The sole basis for the objection, however, is that it might "prejudge" the outcome of a different proceeding that is now underway to determine whether such an arrangement is consistent with the terms of the conditions agreed to by SBC/Ameritech. But whether or not such an arrangement is consistent with the terms of that condition (or whether the Commission is willing to modify the condition if it is not) has no bearing here. The terms on which Bell Atlantic and GTE are willing to agree to a separate data affiliate expressly permit such an arrangement. As explained above, moreover, adopting the condition as proposed is both pro-competitive and will promote the deployment of advanced services. That should be the end of the matter.

The only other claim lodged by opponents here has nothing to do with the modifications proposed by the applicants in their further submission. Rather, it is merely a rehash of their previously-rejected argument that the separate data affiliate should be treated as a "successor or assign" of the incumbent LECs. *See* AT&T at 8; MCI WorldCom at 3. The Commission, however, exhaustively considered the same claim in the SBC/Ameritech proceeding, and rejected the contention that the separate data affiliate necessarily qualifies as a successor or assign of the

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[5] As noted above, the Commission concluded that the "separate affiliate will provide a structural mechanism to ensure that competing providers of advanced services receive effective, non-discriminatory access to the facilities and services of the merged firm's incumbent LECs that are necessary to provide advanced services." *See SBC/Ameritech Order* ¶ 363. That continues to be true. The separate affiliate will ensure that competing providers obtain non-discriminatory access to any wholesale items offered by the incumbent LECs – including any arrangements offered under the terms of this condition.

incumbent LEC. *See SBC/Ameritech Order* ¶ 444-76. Quite the contrary, the Commission adopted an express presumption that, as long as the parties adhere to the terms of the condition, it does not. *Id.* ¶ 445.

D. Uniform interfaces for access to OSS. Bell Atlantic's and GTE's further submission also provides for still greater uniformity in the interfaces and business rules that are used by competing carriers to obtain access to operations support systems. In addition to providing complete uniformity within each of the respective companies' territories, the applicants' propose to provide greater uniformity between those territories where they can do so without incurring prohibitively large costs and without disrupting the operation of carriers who already are using those interfaces.

First, Bell Atlantic and GTE propose to provide uniform interfaces and business rules throughout their combined mid-Atlantic operating territories extending from Maine to Virginia – including in the two states where both companies operate as incumbent LECs (Pennsylvania and Virginia). This modification, which was first proposed by a group of competing carriers (*see* Allegiance March 1 Comments at 8), will allow competitors in those states to interconnect using a single set of interfaces and business rules, rather than the two different sets the respective companies have in those states today.

Second, the modified condition now provides for greater uniformity of interfaces nationwide as well, and would require the merged company to employ common transport and security protocols throughout its combined service areas. This will provide added benefits for the small number of competitors (about 11 percent) who operate in both companies' service territories. And it will do so without requiring the sort of massive system changes that would impose enormous costs and disrupt the operations of the majority of carriers who operate only in one or the other of the two companies' service areas.

The expected response from a few opponents is that this isn't enough of a burden, and the merged company (and other competing carriers) should have to incur the enormous cost – upwards of a billion dollars (*see* Lacouture Decl. ¶ 10) – to provide complete uniformity nationwide. Ironically, the key proponents of this approach (AT&T at 19-20 and MCI WorldCom at 10) have taken the opposite position elsewhere. For example, they warned the California commission that requiring broad uniformity would "undo much of the effort that AT&T and MCI WorldCom have already expended trying to get operational OSS from each applicant," and would "ultimately hinder the efforts of AT&T, MCI WorldCom, Sprint and other CLECs to compete against GTE in California."[6] Moreover, AT&T recently explained to this Commission that it has chosen not to use the same interfaces for all of its local operations, even where they are available. *See* Appendix A at A-10-11. And even here, while AT&T (at 19-20) pays perfunctory lip service to its claim that the merged company should provide uniformity nationwide, it also says it doesn't want uniformity if it would detract from other systems work that is underway – which it most assuredly would.

Moreover, these sometimes converts to the cause of broad uniformity (or, at least, of imposing larger burdens on competitors) don't even try to rebut the prior showings by Bell Atlantic and GTE that moving to complete uniformity nationwide would impose enormous cost and disruption on all concerned with little benefit. Instead, they say only that if it's possible to provide uniformity in Pennsylvania and Virginia, then it should not require much more to do so nationwide.

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[6] *See* AT&T/MCI Brief filed in *In re Joint Application of GTE Corp. and Bell Atlantic to Transfer Control of GTE's California Utility Subsidiaries*, Case No. A 98-12-0005at 36 (Calif. PUC); *see also* Bell Atlantic/GTE Supp. Reply at 13, n.5 (listing additional citations and quotes).

This simply ignores the explanation of how uniformity in those two states would be accomplished. Because of the uniquely large differences in the two companies' underlying networks and operations systems – and the resulting complexity, technical difficulty and cost of developing uniform interfaces and business rules to work with both – the merged company likely will achieve uniformity in large part by changing the underlying network. *See* Lacouture Decl. ¶ 12. It is possible to do so in Virginia and Pennsylvania where both companies operate because there ultimately may be some operating efficiency gains to help offset the large costs. But if AT&T and MCI WorldCom are now suggesting that the merged company should spend the multiple billions of dollars that it would cost to change out switches and operating systems nationwide, that claim is so breathtakingly extreme it answers itself.

E. Uncontested proposals. In their further submission, Bell Atlantic and GTE also propose to add to or modify the conditions in several respects that the Commission previously found would serve the public interest. For example, the applicants modified the out of region investment condition to establish annual benchmarks, ensuring that all the out of region investment cannot be postponed until the end of the three-year term of the conditions. *See SBC/Ameritech Order* ¶421, 439. They agreed to continue to provide line sharing and the other network elements required by the Commission's *UNE Remand Order* during the pendency of any appeals of those orders, and to fund third party audits of the merged company's compliance with those requirements. *Id.* ¶¶ 386-87, 422, 435. And they agreed not to impose mandatory minimum charges on interLATA services throughout the merged company's domestic service territory, regardless of when market leader AT&T finally gets around to fulfilling its commitment to do the same. *Id.* ¶ 400. No party offers any substantive objection to these conditions. They should be adopted as proposed.

III. THE PROPOSED SPIN-OFF OF GENUITY IS FULLY CONSISTENT WITH THE TERMS AND PURPOSES OF SECTIONS 3(1) AND 271.

On April 28, Bell Atlantic and GTE proposed significant revisions to our proposal to spin off Genuity in order to provide still further assurances that the proposal complies fully with both the letter and spirit of the Act.[7] In particular, that further submission made significant revisions to the terms of NewCo's conversion rights, the selection of Genuity's independent board, and the contours of NewCo's investor safeguards.[8]

Under the terms of our modified proposal, the public will own at least 90 percent of the shares of Genuity and NewCo will own less than 10 percent of those shares. NewCo's option to acquire more than 10 percent of Genuity's shares arises only if NewCo eliminates applicable 271 restrictions as to more than 50 percent of Bell Atlantic's lines. If NewCo fails to reach this threshold within five years, the 90 percent public ownership structure will be permanent. Even if NewCo passes the threshold, NewCo cannot exercise the option and own more than 10 percent of Genuity until it has eliminated all applicable 271 restrictions. Furthermore, if NewCo sells its option before eliminating those restrictions as to 95 percent of Bell Atlantic's lines, NewCo will realize none of Genuity's unique appreciation beyond a 10 percent equity interest, and will only receive a standard (S&P 500) return on the remainder of its original investment in Genuity.

This modified proposal only further confirms that NewCo will not "own or control" Genuity pending 271 relief. Under the Act, to "own" means "to own an equity interest (or the equivalent thereof) of more than 10 percent"; the concept of control is not further defined. 47 U.S.C. § 151(1).

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[7] We previously presented a comprehensive legal justification of our spin off proposal, as originally structured, in an April 3 *ex parte* filing. That showing remains fully applicable and largely unanswered. *See,* Letter from William P. Barr to Magalie Roman Salas (Apr. 3, 2000).

[8] Letter from William P. Barr to Magalie Roman Salas (Apr. 28, 2000).

The precise issues here are whether (i) NewCo's conversion rights constitute an "equity interest (or the equivalent thereof) of more than 10 percent" and thus "ownership" of Genuity, and (ii) whether, by virtue of the various terms of our proposal, NewCo will "control" Genuity.

The answer to both these questions is an emphatic "no," as the overwhelming weight of *relevant* legal authority – including judicial, Commission and MFJ precedent – makes abundantly clear. Nonetheless, in a last gasp attempt to block a merger that will produce a stronger competitor to it, AT&T claims otherwise. In order to do so, however, it is forced to retreat to an absolutist position that *all* options constitute a current equity ownership interest. And it is forced to rely on authorities from a host of unrelated areas – including the securities laws, the bankruptcy code and even financial accounting practices – that have no bearing here (and in many instances actually contradict its own arguments). Ironically, AT&T points to virtually everything under the sun except the purposes of section 271 itself.

In the end, the very most that AT&T can hope to accomplish is to show that the statutory terms are ambiguous and susceptible of more than one interpretation. But even assuming our reading of the statute is not compelled by its plain terms, that merely means that the agency charged with administering the statute must inevitably make "policy choices" when filling in the gaps left by these ambiguities, and has latitude to adopt any permissible construction of the statute that in its view reconciles "competing views of the public interest." *See Chevron U.S.A. Inc v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984). And a reviewing court "must defer to [that] interpretation so long as it is *reasonable, consistent with the statutory purpose, and not in conflict with the statute's plain language*." *Public Citizen v. Carlin*, 184 F.3d 900, 903 (D.C. Cir. 1999), *cert. denied*, 120 S. Ct. 1267 (Mar. 6, 2000) (emphasis added) (citation omitted).

It follows that AT&T has erroneously framed the inquiry in this case by insisting that the issues here are "not of policy," Opposition at 29, and that section 3(1) forbids the Commission's "weighing of competing policy considerations." AT&T's March 10 Ex Parte at 1. Even under the most charitable reading of AT&T's arguments, the Commission is well within its authority in relying on its own "views of wise policy to inform its judgments" of how best to resolve ambiguities in the statute. *Chevron*, 467 U.S. at 865. The issue, therefore, is not whether the Commission may legally approve our proposal – as we demonstrate below it unquestionably can – but simply whether it should. As we explain further below, it plainly can.

We respond below, as appropriate, to each of the arguments made in AT&T's May 5 Opposition.[9] In support, we attach a Third Supplemental Declaration of Professor Ronald J. Gilson ("Gilson Third Supp. Decl.") (Appendix B), and a Declaration of Paul R. Gudonis (Appendix C). We also attach, as a combined Appendix D, a Revised Exhibit A, which clarifies (without substantive change) our modified proposal, as well as a Revised Exhibit C, which further relaxes one of NewCo's investor safeguards.

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[9] At the outset, we must respond to two of AT&T's accusations. First, AT&T falsely charges that we have mischaracterized GTE's April 10 statements to investment analysts. *See* Opposition at 8. But it was made clear in those statements that GTE, even in the absence of the merger, would still likely conduct a partial IPO of Genuity's stock, and thus GTE was accurately describing its likely accounting treatment for Genuity on a "standalone" basis. Second, AT&T implies that GTE's petition for section 32.72(c) waiver of its transitional commercial transactions with Genuity somehow proves that we "do not believe" that Genuity will not be an affiliate of NewCo. Opposition at 7 & n.4. But as GTE's section 32.72(c) waiver petition stated, the reason GTE sought the waiver was precisely because "[a]fter GTE's ownership in Genuity is reduced to 10 percent, Genuity will become a non-affiliate under the Act . . ." Petition of GTE Service Corporation and GTE Consolidated Services Incorporated for Waiver of 47 C.F.R § 32.72(c) (Apr. 25, 2000), at 3. GTE simply asked that its transitional services be exempted from the FDC or FMV recording requirements of section 32.27(c) in order to "support the transition of a limited set of functions to Genuity" and thereby "facilitate the smooth transition to Genuity's operation as an independent company." *Id.*

A. NewCo's Option Is Not Ownership Of An Equity Interest Or The Equivalent Thereof.

Section 3(1)'s ownership standard is not met unless NewCo would "own an equity interest (or the equivalent thereof) of more than 10 percent." Given the use of the present tense ("owns," "is owned," "is under common ownership"), that standard would be met only if NewCo's option to acquire stock in Genuity were itself, currently and before any future exercise, "an equity interest" or "the equivalent thereof."[10] But the Commission can and should conclude that the option here, a conversion right subject to specified conditions, is neither an equity interest nor the equivalent of such an interest.

1. NewCo Will Not "Own" a Prohibited "Equity Interest" in Genuity.

The best construction of "equity interest" – and certainly a permissible construction – excludes the option NewCo would hold in Genuity. The three legal rights that traditionally accompany equity ownership are the rights to vote, to participate in corporate earnings, and to participate in dissolution proceeds.[11] The NewCo conversion right, or option, is not a share of the corporation, but only the right to acquire a share of the corporation in the future. Until exercised, it confers none of the three participation rights of equity ownership: before exercising the right to acquire greater than 10 percent of Genuity, NewCo is not entitled to more than 10 percent of the vote, earnings or liquidation distributions of Genuity. The NewCo holding, therefore, lacks the set of critical attributes that are characteristic of an "equity interest."

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[10] *See, e.g., Sutton v. United Air Lines*, 119 S. Ct. 2139, 2146 (1999) (holding that because a statute defined "disability" in the "present indicative verb form" as an "impairment that substantially limits" a major life activity, the statute "requir[es]" that a person "be presently– not potentially or hypothetically– substantially limited in order to demonstrate a disability"); *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes.").

[11] *See, e.g.*, First Gilson Decl. ¶ 16.

This understanding is confirmed not only by common legal usage, see *Association of Flight Attendants v. USAir Inc.*, 24 F.3d 1432, 1435 (D.C. Cir. 1994) ("USAir has *no present equity interest* in Shuttle, but it has *an option to purchase a controlling interest* in the company effective October 10, 1996.") (emphasis added), but also by the legal treatment of options and conversion rights in numerous contexts. For example, numerous corporate law precedents specifically conclude that an option to acquire stock, or a debenture convertible into stock, is not an "equity interest." *See, e.g., Powers v. British Vita, P.L.C.*, 969 F. Supp. 4, 5 (S.D.N.Y. 1997) ("Many cases hold that an option contract does not qualify as an equity interest."); *Starkman v. Warner Communications, Inc.*, 671 F. Supp. 297, 304 (S.D.N.Y. 1987) ("The [option] instrument stands alone, claiming no equity in the corporation, entitled to no vote, and with no fiduciary obligation of the management to the optionholder's interest."); *Hecht v. Papermaster*, No. L-12691-96, slip op. at 108 (N.J. Super. Ct. May 12, 1998) ("plaintiffs do not and did not hold an equity interest"); *Simons v. Cogan*, 549 A.2d 300, 303-04 (Del. 1988) ("A debenture is a credit instrument which does not devolve upon its holder an equity interest in the issuing corporation . . . . Similarly, the convertibility feature of the debenture does not impart an equity element until conversion occurs."); *Kusner v. First Pennsylvania Corp.*, 395 F. Supp. 276, 281 (E.D. Pa. 1975), *rev'd on other grounds*, 531 F.2d 1234 (3rd Cir. 1976) (holding same); 18A Am. Jur. § 565 (1985) ("the holder of a convertible bond is generally considered to be, during the time the bonds are running, in no sense a stockholder, and is not considered to have any vested right in any particular stock").[12]

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[12] *See also Martin v. Schindley*, 442 S.E. 2d 239, 241 (Ga. 1994) ("An option to purchase land does not, before acceptance, vest in the holder of the option *any interest, legal or equitable,* in the land.") (emphasis added); *Ball v. Overton Square, Inc.*, 731 S.W.2d 536, 540 (Tenn. Ct. App. 1987) ("[A]n option to purchase stock does not vest in the prospective purchaser *an equitable title to, or any interest or right*, in the stock.") (emphasis added); James on Option Contracts § 501 (1916) ("the weight of authority" "holds that an option
(continued...)

This general principle of law – that options and convertible rights are not "equity interests" or ownership until exercised – is also reflected in the legal contexts most relevant to the present proposal. First, the acquisition of an option, warrant or similar convertible interest does not trigger Hart-Scott-Rodino merger review under the antitrust laws. *See* 16 C.F.R. § 802.31 (exempting acquisition of "convertible voting securities" from HSR reporting requirements). Rather, only "subsequent conversions" of such interests trigger review. *Id.*

Second, the Commission has consistently ruled that options and other convertible interests are only "potential future equity interests" and not current ownership interests for purposes of various ownership limits designed to safeguard competition. *Biennial Review of Spectrum Aggregation Limits*, Report and Order, WT Docket No. 98-205, ¶ 8 (Sep. 22, 1999). *See also In re Woods Communications Group*, 12 FCC Rcd 14042, ¶¶ 13-14 (1997) (characterizing options as "future equity holdings" and "possible equity interest[s]"). These include the Commission's CMRS spectrum cap rules, 47 CFR § 20.6(d)(5) (CMRS spectrum cap rules) (excluding options, warrants and other conversion rights from attribution); its LEC/LMDS cross-ownership rules, *id.* § 101.1003(e)(5) (LEC/LMDS cross-ownership rules) (same); its application of section 310's foreign ownership ban, *BBC License Subsidiary*, 10 FCC Rcd 10968, ¶ 20 n.12 (1995) (foreign ownership ban of 47 U.S.C. § 310(b)(4)) ("future interests, such as options and convertible rights, are not relevant to our alien ownership determinations until converted"); its cable attribution rules, 47 C.F.R. § 76.501, Note 2(e) (cable attribution rules) (same); and its former cable-telco cross-

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[12](...continued)
contract to purchase *does not vest any estate, legal or equitable*, in the optionee prior to his election to purchase") (emphasis added); 12A Fletcher Cyclopedia of Private Corp. § 5575 (1993) ("An option to purchase stock does not vest in the prospective purchaser *an equitable title to, or any interest or right in*, the stock.") (emphasis added).

ownership rules, 47 C.F.R. § 63.54(e)(5); *In re Telephone Company-Cable Television Cross-Ownership Rules,* 10 FCC Rcd 244 (1994).

The *Fox Television Cases*, stressed by AT&T, Opposition at 12-15, simply confirm that determinations of corporate ownership turn upon the presence or absence of the three corporate participation rights of voting, earnings and liquidation distributions. There, the foreign corporation News Corp. owned only 24 percent of Fox's voting stock, but the Commission nonetheless concluded that News Corp. held greater than section 310(b)(4)'s foreign ownership ceiling of 25 percent of the "capital stock" *because* it had "the right to substantially all of [Fox's] profits and losses and also [had] the right to substantially all of [Fox's] assets upon its sale or dissolution." 10 FCC Rcd 8452, ¶ 50. Indeed, although *Fox Television* did not address the precise question presented here – whether options and other conversion rights constitute current equity ownership – several other foreign ownership cases have squarely concluded that they do not. *See, e.g., Nextwave Personal Communications, Inc.*, 12 FCC Rcd 2030, ¶ 46 (1997) ("future interests including warrants, options, and convertible debt do not constitute capital stock until exercised or converted"); *see also* GTE March 14, 2000 Ex Parte at 13 n.6 (citing authorities).

Third, the general rule that potential future interests are not current equity ownership is reflected in the precedents under the MFJ, which was the immediate precursor to section 271. In a long line of cases, the Justice Department approved and Judge Greene allowed options and other conditional interests to be acquired by Bell companies in prohibited businesses, including interLATA businesses. *See, e.g.*, Supp. Filing at 40-43. In the proceeding in which Judge Greene approved the first such option, thereby allowing NYNEX to purchase a fixed-price option in a company constructing interLATA circuits between the U.S. and Europe, the Justice Department wrote:

> During the interim period [while NYNEX held the option], NYNEX would not have any kind of equity interest in Tel-Optik.

Report of the United States to the Court Concerning Proposed Purchase by NYNEX Corp. of Conditional Interest in Tel-Optik, Ltd., at 10, *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. filed June 20, 1986). *See also id.* at 12 ("The conditional interest to be secured by NYNEX does not constitute an 'equity interest' as that term is normally used."); Response of the United States to Comments Concerning the Proposed Purchase by NYNEX Corp. of a Conditional Interest in Tel-Optik, Ltd., at 12, *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. filed July 11, 1986) ("NYNEX Will Not Acquire an Equity Interest in Tel-Optik As a Result of the First Step of the Proposed Transaction"). Judge Greene used the term "equity interest" similarly in the same case, and contrasted a Bell company's acquisition of the initial option which "shall not" require "the approval of the Court," with the "actual acquisition by a Regional Holding Company of an equity interest in an entity engaged in activities prohibited by the decree [which] may not occur without a waiver granted by the Court." Memorandum at 6, *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. Aug. 7, 1986). These precedents by themselves conclusively disprove AT&T's premise that potential future interests are necessarily, or even ordinarily – or, critically, likely believed by the 1996 Congress to be – "equity interests."

The MFJ precedents are especially important to this inquiry because section 3(1)'s definition of "affiliate" appears to have been patterned on the definition of "affiliate" in section IV(A) of the MFJ. Section 3(1) reads:

> The term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.

47 U.S.C. § 151(1). This language exactly parallels the MFJ's definition of "affiliate":

> "Affiliate" means any organization or entity . . . that is under direct or indirect common ownership with or control by AT&T or is owned or controlled by another affiliate. For the purposes of this paragraph, the terms "ownership" and "owned" mean a direct or indirect equity interest (or the equivalent thereof) of more than fifty (50) percent of an entity.

MFJ Section IV(A). Both definitions begin with a broad defining sentence including the elements of "direct or indirect," "ownership," "control" and "common ownership." The second sentences of the two definitions are virtually identical to each other – including their use of the identical phrase "equity interest (or the equivalent thereof)" – although the percentage of equity interest that triggers affiliation differs. When Congress codifies a specific phrase such as "equity interest (or the equivalent thereof)" in the same context where it was previously employed, Congress must have intended to incorporate the prior accepted meaning of that phrase.

The preceding authorities readily establish the familiarity of excluding mere options from current equity interests. Rather than come to grips with these authorities, AT&T has once again muddied the waters by relying on authorities from unrelated areas – primarily securities, bankruptcy and accounting – as if definitions (of varying terms) from such areas control the available meaning here. Other commentators who also oppose Bell Atlantic/GTE's proposal nonetheless properly reject that suggestion: "the Commission should look beyond the question of whether a particular arrangement would create an equity interest for accounting, tax, or securities law purposes" and instead "develop a standard" based on the "policy objectives" of section 271. Information Technology Association of America, Opposition at 4; *see also* Association for Local

Telecommunications Services, Opposition at 9. The Commission has recognized that such wholesale importation would be an abdication of its role to construe a statute consistent with the particular statutory context. *See In the Matter of AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd 21438, ¶ 27 n.108 (1998). AT&T's authorities cannot properly be transposed to control the Commission's decision here.

Securities Laws. That the securities laws regard an option as an "equity *security*" for the purposes of insider trading prohibitions does not establish that NewCo's option must be regarded as an "equity *interest*" by the Commission. AT&T has simply pointed to a different term in a different statute that serves a very different purpose. *See generally* Gilson Supp. Decl. ¶¶ 4-16 (discussing at length the "entirely different" purposes of the securities laws); Gilson Second Supp. Decl. ¶ 8. Indeed, before 1991 options were *not* uniformly regarded as "equity securities" even for purposes of the securities rule relied upon by AT&T.[13] The Securities and Exchange Commission expressly altered the rule – and acknowledged the change in position – in 1991 so that the rule would apply to options.[14] This history confirms our *Chevron* argument that the ambiguous terms

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[13] Before 1991 "there was considerable controversy concerning whether options should qualify as 'equity securities of [the] issuer' within the meaning of § 16(b)." *Citadel Holding Corp. v. Roven*, 26 F.3d 960, 964-65 (9th Cir. 1994). A number of courts had held that options were not equity securities,*see id.* (discussing cases); *Petteys v. Butler* 367 F.2d 528, 537-38 (8th Cir. 1967) (same).

[14] In 1991 the SEC rewrote its rules interpreting section 16 to make, for the*first time* since the creation of section 16(b), "the acquisition of a derivative security . . . a reportable event." *Ownership Reports and Trading by Officers, Directors and Principal Security Holders*, 56 F.R. 7242, 7250 (Feb. 8, 1991). The SEC acknowledged that this was a drastic change in law that "not only*reverses* the Commission's own regulatory approach but also differs from a line of cases that, in the absence of rules to the contrary, have held that an acquisition of a right is not a purchase of an equity security unless accompanied by an irrevocable liability to pay for the stock, or other indicia of beneficial ownership." *Id.* The SEC's decision to re-define equity security to include derivative securities for the purpose of section 16(b) was an exercise of that Commission's discretion based on its conclusion that such a modification would promote the disclosure purposes of section 16(b). *Id.* at 7248-49.

"own" and "equity interest" – like the different term "equity securities" – must be interpreted in light of the particular policy purposes of the statute in which they appear.

Bankruptcy Law. AT&T draws on yet another statute – the bankruptcy code – to establish that options are always "equity securities." That the bankruptcy code specifically defines options as "equity securities" further confirms that the term "equity" does not unambiguously include options. Otherwise, this specification in the bankruptcy code would be superfluous. And just like the securities laws, the bankruptcy code defines a different term and serves very different purposes than the Communications Act. One of the primary purposes of bankruptcy law is to prioritize claims against an estate in bankruptcy. To further this policy, bankruptcy law treats *some* potential future interests – such as options – like equity for the purpose of prioritizing the holder's economic interest in the estate. But it also treats *other* such interests – such as convertible debt – as debt rather than equity in order to protect the priority status of that interest. *See, e.g.,* Opposition at 18 n. 16 (discussing section 101(16)(C) of the bankruptcy code). The point is that bankruptcy courts craft